Supreme Court, U.S.
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No.- 98-1146

IN THE

Supreme Court of the United States

October Term, 1998

DANIEL SCHLEIFER, a minor by Barry Schleifer, WILLIAM MCCUTCHEON, a minor by M. Parthenia Monago, his mother; LISA BRIGGS, a minor by Anne Briggs, her mother; NORA LALLY-GRAVES, a minor by Mary Ann Lally-Graves, her mother; JILL LANDERS JAQUITH, a minor by Harry James Landers, her father; ANNE BRIGGS; HARRY JAMES LANDERS; and WALDO DAVID LANDERS JAQUITH,

Petitioners,

v.

CITY OF CHARLOTTESVILLE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent the City of Charlottesville, Virginia respectfully requests that this Court deny the Petition for a Writ of Certiorari (hereinafter "Pet. for Writ of Cert.") seeking review of the decision of the Court of Appeals for the Fourth Circuit in this case.

THE LOWER COURT OPINIONS

On April 30, 1997 the United States District Court for the Western District of Virginia entered an order denying Petitioners' motion for preliminary injunctive relief. The memorandum opinion accompanying that order is reported as *Schleifer v. City of Charlottesville*, 963 F.Supp. 534 (W.D. Va. 1997). On May 20, 1997 the trial court entered on order denying Petitioners' request for permanent injunctive relief; the memorandum opinion that accompanied that order is reported as *Schleifer v. City of Charlottesville*, 992 F.Supp. 823 (W.D.Va. 1997). On October 20, 1998 the Court of Appeals for the Fourth Circuit affirmed the trial court's decisions. The Fourth Circuit opinion is reported as *Schleifer by Schleifer v. City of Charlottesville*, 159 F.3d 843 (4th Cir. 1998). The Petitioners have reproduced the contents of each of these opinions within the Appendix to their Petition for a Writ of Certiorari.

THE ORDINANCE AT ISSUE IN THIS CASE

The Petition for a Writ of Certiorari submitted by the Petitioners in this case involves a curfew ordinance applicable to juveniles, enacted in 1996 by the City Council for the City of Charlottesville, Virginia. The ordinance is set forth in the Charlottesville, Va. Code, Section 17-7 (1990 & Supp. 1997)(effective Mar. 1, 1997) and is also set forth verbatim within the appendix to this Brief in Opposition, at App. 1 - 6.

STATEMENT OF THE CASE

Petitioners' Questions Presented state that Charlottesville's juvenile curfew ordinance "forbids minors from leaving their houses" during certain portions of the day. This characterization distorts the actual wording of the ordinance. *See* Appendix to this Brief, at App. 3 - 4. One of the best summary descriptions of Charlottesville's curfew ordinance is found within the Fourth Circuit's opinion below:

> The ordinance does not restrict minors' activities that fall under one of its eight enumerated exceptions. Minors may participate in any activity during curfew hours if they are accompanied by a parent; they may run errands at a parent's direction provided that they possess a signed note. The ordinance allows minors to undertake employment or attend supervised activities sponsored by school, civic, religious, or other public organizations. The ordinance exempts minors who are engaged in interstate travel, are on the sidewalk abutting their parents' residence, or are involved in an emergency. Finally, the ordinance does not affect minors who are exercising First Amendment rights protected by the United States Constitution, such as the free exercise of religion, freedom of speech and the right of assembly.

Schleifer by Schleifer v. City of Charlottesville, 159 F.3d 843, 846 (4th Cir. 1998); *Pet. for Writ of Cert.*, A54.

Within the second of their Questions Presented Petitioners assert there is no "meaningful evidence" that the curfew actually serves its objectives. A reading of the record and opinions of both the court of appeals and the trial court shows otherwise. The trial court rejected Petitioners' arguments along these lines, and after a careful discussion of the "copious" evidence presented, found "a strong evidentiary nexus between the means chosen by the City and the articulated government interest." *Schleifer v. City of*

Charlottesville, 992 F.Supp. 823, 826 (W.D.Va. 1998); *Pet. for Writ of Cert.*, A42. The totality of the evidence introduced in the trial court clearly establishes that Charlottesville has experienced a real and significant juvenile crime problem in recent years. *Schleifer v. City of Charlottesville*, 963 F.Supp. 534, 544-45 (*Pet. for Writ of Cert.*, A16-A20); *Schleifer*, 992 F.Supp. at 825-27 (*Pet. for Writ of Cert.*, A40-A42). As the trial court noted, "The exhibits reveal considerable and careful deliberation and extensive research by the City and the proponents of the curfew law." *Schleifer*, 992 F.Supp. at 826 (*Pet. for Writ of Cert.*, A42). *See also* the Fourth Circuit's analysis of the evidence, *Schleifer by Schleifer*, 159 F.3d at 848-51 (*Pet. for Writ of Cert.*, A57-A64). Each of the courts below determined that the City's evidence sufficed to allow the curfew ordinance to survive constitutional scrutiny under either an intermediate or a strict standard of judicial review. *Schleifer by Schleifer*, 159 F.3d at 847, 851 (*Pet. for Writ of Cert.*, A56-A57, A65); *Schleifer*, 992 F.Supp. at 825, 827 (*Pet. For Writ of Cert.* A40, A44); *Schleifer*, 963 F. Supp. at 543 (*Pet. For Writ of Cert.*, A14).

The City recognizes that this Court does not have the record of the proceedings below before it, and that, therefore, Petitioners' references to "J.A.," the joint appendix prepared for the Fourth Circuit, *see Pet. for Writ of Cert.*, at 7, *et al.*, provide little useful information. However, in response to the Petitioners' continued assertions that the lower courts' decisions in this case are supported by no "meaningful evidence," and their argumentative characterizations of what is demonstrated by the record, the City finds it necessary to underscore the most important evidence admitted at trial in the City's favor. Should the Court deem it necessary to review the evidence in this case, the remaining portion of this Statement provides page references to the same Fourth Circuit appendix to which the petitioners have referred.

Charlottesville's concerns for the welfare and safety of its community, particularly its youngest citizens, are justified,

and this was recognized by the trial court and the Fourth Circuit, below. The curfew ordinance was a City Council initiative evaluated and investigated carefully for a period of at least a year prior to enactment (J.A. 481-482, 520),[1] and during several public hearings (J.A. 586, 589, 596). The number of juvenile delinquency cases proceeding to final judgment in the City's courts increased by twenty-five percent during the past six years, (J.A. 56, 149), and this trend was confirmed by the City's Commonwealth's Attorney in his testimony before the trial court (J.A. 56-57). An expert witness for the City, Dr. William Ruefle, testified that Charlottesville's trend is consistent with those noted at state and national levels (J.A. 74-75). One of the most important pieces of information obtained from City police records is that the percentage of children of ages 10-16 arrested for crimes in Charlottesville increased from 1995 to 1996. The police records document that in 1995, eighty percent of juvenile arrests for the most serious crimes were of children ages 10-16 (J.A. 598), and seventy-five percent of the total juvenile arrests for 1995 were of children ages 10-16 (J.A. 599). In 1996, eighty-five percent of juvenile arrests for the most serious crimes were of children ages 10-16 (J.A. 600); that year, eighty-three percent of total juvenile arrests involved children ages 10-16 (J.A. 601).

Juvenile offenses occurring between 11:00 p.m. and 6:00 a.m. increased by thirty-eight percent during 1995, and an additional ten percent during 1996 (J.A. 574). City police officers as well as the City's Commonwealth's Attorney confirmed at trial that the most serious crimes being committed by juveniles within the City are being committed during hours that fall within the Curfew hours (J.A. 57, 58, 174, 178, 294, 295, 297). The evidence adduced by the City also proved that certain particularly egregious types of crime occur at a greater rate of frequency during the late-night hours

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[1] Petitioners erroneously state that the curfew was enacted at the suggestion of the Chief of Police, *Pet. for Writ of Cert.*, at 7.

of the curfew than during other hours of the day. Police incident reports indicate that in 1996: (i) aggravated assaults were almost one and a half times as likely to occur during Charlottesville's curfew hours than other times of day; (ii) robbery was more than twice as likely to occur during curfew hours; (iii) forcible rape was more than three times as likely to occur during curfew hours; and (iv) incidents of drunk driving were five times more likely to occur during curfew hours than during non-curfew hours (J.A. 608)(*see* Appendix to this Brief, at App. 7). Similar numbers were obtained for January-April 1997 (J.A. 609)(*see* Appendix to this Brief, at App. 8).

Following the substantial evidence introduced at trial by the City, which established a strong nexus between this ordinance and its objectives, the Petitioners were unsuccessful in their attempt to disprove or discredit that causal link. They claim to have provided evidence which proves that "juvenile crime tends to occur most heavily in the afternoon hours after school," *Pet. for Writ of Cert.*, at 7. In support of this claim they refer the Court to a chart which appears within a document entitled "Juvenile Offenders and Victims: A National Report." (J.A. 456). Similarly, Petitioners claim that children are victimized by criminal acts primarily during after-school hours. *Pet. for Writ of Cert.*, at 8; (J.A. 346). However, a close review of the reports and data upon which each of these claims is based reveals that the Petitioners proved no trend applicable anywhere except South Carolina.[2]

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[2] The data to which they refer was collected solely from a South Carolina record system (J.A. 456, 126). Plaintiffs' own evidence admits this data is not nationally representative (J.A. 124). Unfortunately, this single unproven compilation of information from some jurisdictions in South Carolina is being cited across the nation as "proof" that, everywhere, juvenile crime and victimization tend to occur predominantly during after-school hours. *See, e.g., Hutchins v. District of Columbia*, 942 F.Supp. 665, 676 (D.D.C. 1996).

They offered no evidence to verify similar patterns in Charlottesville.[3]

The chart to which the Petitioners refer the Court plots the results of a South Carolina study,[4] wherein a researcher reported that juvenile violence occurs with greater frequency after school than during the hours of a typical curfew (*see* J.A. 456 and J.A. 113). Two problems render this study suspect. First, Petitioners' researcher and the City's expert witness agree that the data could be skewed if jurisdictions from which the data was collected had curfew ordinances in effect, as one or more South Carolina cities did (i.e., the existence of curfews could be having a beneficial deterrent affect on crime, or could be protecting children against greater levels of victimization, during the hours covered by those curfews) (*see* J.A. 85; *and see* J.A. 390, line 19 through J.A. 391, line 1). Second, the South Carolina study characterizes simple assaults (*e.g.*, an after-school fistfight, or the mere threat of a fistfight, see J.A. 392) as "violent crimes" (J.A. 113). Petitioners' researcher conceded that simple assaults are not considered "violent crimes" by professionals who analyze crime trends (J.A.391), and excluding simple assaults from the data analyzed, the South Carolina study actually documents that, in South Carolina, a larger percentage of juvenile sexual assaults, robberies, and aggravated assaults occur late at night, during typical curfew hours, than during after-school hours (J.A. 113, 392).

The court below wisely focused on the evidence in its entirety, not just on any single statistic, and determined that the City of Charlottesville demonstrated a strong nexus between the curfew ordinance and its objectives. The juvenile curfew ordinance at issue in this case constitutes a reasonable,

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[3] Indeed petitioners' researcher considered no Charlottesville-specific information at all (J.A. 375, 395). Even though analysis of juvenile court data is his primary professional focus (J.A. 344), this man did not bother to review Charlottesville's juvenile court caseload statistics (J.A. 383).

[4] *See* footnote 2, *supra*.

constitutional exercise of the City's authority to enact legislation to protect the welfare and safety of children.

REASONS TO DENY A WRIT OF CERTIORARI

1. THE FOURTH CIRCUIT'S DECISION IS CONSISTENT WITH THE DECISIONS OF THE FEW OTHER UNITED STATES COURTS OF APPEAL WHICH HAVE REVIEWED JUVENILE CURFEW ORDINANCES.

In 1976 the Court of Appeals for the First Circuit affirmed a lower court decision upholding the constitutionality of a juvenile curfew ordinance similar to Charlottesville's. *Bykofsky v. Borough of Middletown*, 535 F.2d 1245 (3rd Cir. 1976) *aff'g* 401 F.Supp. 1242 (M.D. Pa. 1975) *cert. denied* 429 U.S. 964 (1976). That same year the Court of Appeals for the Second Circuit declared a juvenile curfew ordinance void for vagueness, because the ordinance failed to specify an hour at which the curfew ended. *Naprstek v. City of Norwich*, 545 F.2d 815 (2nd Cir. 1976).[5] In 1981 the Court of Appeals for the Fifth Circuit invalidated a juvenile curfew, because the ordinance failed to provide a sufficient number of exceptions. *Johnson v. Opelousas*, 658 F.2d 1065 (5th Cir. 1981). A decade later the Fifth Circuit upheld a juvenile curfew ordinance almost identical to Charlottesville's, which provided a number of exceptions allowing a variety of nocturnal activities for children. *Qutb v. Strauss*, 11 F.3d 488 (5th Cir. 1993) *cert. denied sub nom. Qutb v. Bartlett*, 511 U.S. 1127 (1994). Although the Court of Appeals for the Ninth Circuit recently invalidated a San Diego curfew ordinance applicable to children, *Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997), that court indicated that its decision rested on two factors: (1) the San

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[5] The Second Circuit stated, "This holding is expressly limited to the constitutional infirmity presented by the lack of a termination time for the curfew. We express no opinion on the merits of plaintiffs' other First Amendment and due process attacks on the curfew ordinance." *Naprstek*, 545 F.2d. at 818.

Diego ordinance at issue was worded differently than the ordinance validated by the Fifth Circuit,[6] and (2) the San Diego ordinance failed to provide adequate exceptions.[7]

Like Charlottesville's juvenile curfew ordinance, the ordinances reviewed in *Bykofsky* and *Qutb* carefully balanced the interests of juveniles, their parents and the locality enacting the curfew. This balance is reflected in the numerous exceptions written into the ordinances, allowing a wide variety of nocturnal activities for children. *See* Section 17-7(b)(1)-(8) of the Charlottesville City Code, set forth within the Appendix to this Brief, at App. 3 - 4 and within *Schleifer by Schleifer v. City of Charlottesville*, 159 F.3d 843, 855-858 (4th Cir. 1998). *See also Qutb*, 11 F.3d at 496-498; *Bykofsky*, 401 F.Supp. at 1246-1247. Furthermore, in each of these three cases there existed substantial evidence upon which the reviewing courts could conclude that juvenile curfews would further the purposes for which they had been enacted. *Schleifer v. City of Charlottesville*, 159 F.3d at 849-851; *Qutb*, 11 F.3d at 493; *Bykofsky*, 401 F.Supp. at 1255-56.

It should be noted that the Court of Appeals for the District of Columbia recently granted a rehearing en banc and vacated the panel decision in *Hutchins by Owens v. District of Columbia*, 144 F.3d 798 (D.C.Cir. 1998). *Hutchins by Owens v. District of Columbia*, 156 F.3d 1267 (D.C. Cir. 1998). Significantly, the decisions in *Hutchins* to date have turned

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[6] The Ninth Circuit ruled that San Diego's ordinance was unconstitutionally vague, because (unlike the ordinance at issue in *Qutb* or the present case) the ordinance made it unlawful for minors to "loiter, idle, wander, stroll or play in or upon the public streets...." *Nunez*, 114 F.3d at 938.

[7] The Ninth Circuit stated, "Clearly, San Diego could have enacted a narrow curfew ordinance that would pass constitutional muster. Its present ordinance is problematic because it does not provide exceptions for many legitimate activities.... In this regard, it is significant that San Diego rejected a proposal to tailor the ordinance more narrowly by adopting the broader exceptions used in the ordinance upheld in *Qutb*." *Nunez*, 114 F.3d at 948-49.

upon special circumstances of that case, *i.e.*, the limited evidence introduced by the District of Columbia prior to the trial court's entry of summary judgment. *See Hutchins by Owens*, 144 F.3d at 815-16; *Hutchins v. District of Columbia*, 942 F.Supp. 665, 675-679 (1996).

2. THE FOURTH CIRCUIT'S DECISION IS CONSISTENT WITH RELEVANT DECISIONS OF THE SUPREME COURT PERTAINING TO CHILDREN'S RIGHTS UNDER THE FOURTEENTH AMENDMENT.

By stating that this Court has "never before addressed the constitutionality of an indefinite, non-emergency curfew," *Pet. For Writ of Cert.* at 11, petitioners neglect the most significant aspect of the case at hand: this case involves a curfew ordinance enacted to promote the welfare and safety of children. Lower courts have ample guidance as to how to analyze the constitutionality of such legislation.

First, the Court long has recognized that the state has "broader authority to regulate the activities of children than of adults." *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976). This is particularly true with respect to the public activities of children. *See Ginsberg v. New York*, 390 U.S. 629, 638 (1968); *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). Furthermore, precedent confirms that legislation which touches upon important liberty interests of children is justified by a strong governmental interest in the welfare and safety of children:

> "[The] state's assertion of authority [to protect the welfare of children]...is no mere corporate concern of official authority. It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."

Prince, 321 U.S. at 165. *See also Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990) ("The state has a strong and legitimate interest in the welfare of its young citizens, whose

immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely."); *Schall v. Martin*, 467 U.S. 253, 264-65 (1984) (confirming that protecting a child and society from the child's criminal acts is a legitimate and compelling governmental interest). Certainly the laws at issue in the cases cited above implicated liberty interests no less weighty than those touched upon by this curfew ordinance. The cases in which the Court has reviewed legislation regulating a child's ability to obtain an abortion are illustrative, because they confirm that the Court will review legislation regulating a child's activities with scrutiny less stringent than would be applied to a review of the same activities of an adult. *See, e.g., Hodgson*, 497 U.S. at 448; *Carey v. Population Svcs. In'l.*, 431 U.S. 678, 693 (1977).

Petitioners cite to cases such as *Kolender v. Lawson*, 461 U.S. 352 (1983), and *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), to advance an argument that a law restricting a person's movement in any way should be subjected to the strictest judicial scrutiny. Aside from the fact that those cases were not analyzed by the Court in an Equal Protection context, they made reference to the liberty interests of adult citizens, not children. Juvenile curfew ordinances like Charlottesville's regulate only a child's interest in remaining unaccompanied on City streets late at night, and the Court has repeatedly confirmed that such rights of self-determination, for children, are limited. "It is true children have rights, in common with older people, in the primary use of highways. But even in such use streets afford dangers for them not affecting adults." *Prince*, 321 U.S. at 169. In *Schall v. Martin*, the Court stated,

> The juvenile's countervailing interest in freedom from institutional restraints, even for the brief time involved here, is undoubtedly substantial. . . . But that interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody.... Children, by definition, are not

> assumed to have the capacity to take care of themselves.

467 U.S. at 265. In 1993 the Court again indicated that, because children are always in some form of custody, they cannot simultaneously be said to have a fundamental right to come and go at will. See *Reno v. Flores*, 507 U.S. 292, 302 (1993). In *Vernonia School District 47J v. Acton*, 515 U.S. 646, 654 (1995) the court recently stated, "Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination–including even the right of liberty in its narrow sense, i.e., the right to come and go at will."

To the extent that some lower courts may be scrutinizing juvenile curfew ordinances more critically than applicable Supreme Court decisions require, their approach works in favor of individual constitutional rights. Particularly in this case, where the trial court and the court of appeals each determined that the City's evidence would suffice to justify Charlottesville's ordinance even under the strictest judicial scrutiny, this Court need not grant a writ of certiorari to revisit principles articulated consistently from Prince through Vernonia.

3. THE FOURTH CIRCUIT'S DECISION COMPORTS WITH SUPREME COURT PRECEDENT ESTABLISHING PARENTS' RIGHTS OF AUTHORITY WITHIN THEIR HOUSEHOLDS TO DIRECT THE REARING OF THEIR CHILDREN.

Certainly it has long been recognized that there is a private realm of family life which the state may not enter, *see Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). *See also Wisconsin v. Yoder*, 406 U.S. 230 (1972); *Ginsberg v. New York*, 390 U.S. 629 (1968). Yet even while recognizing parental rights in this regard, the Court has cautioned parents, "the very concept of ordered liberty precludes allowing every person to make his own

standards on matters of conduct in which society as a whole has important interests." *Yoder*, 406 U.S. at 215-16. *Cf. Ginsberg*, 390 U.S. at 640 ("the state also has an independent interest in the well-being of its youth."); *Prince*, 321 U.S. at 166 ("... the family itself is not beyond regulation in the public interest.").

Undeniably, Charlottesville has important and compelling interests in protecting its community from crime. *Schall v. Martin*, 467 U.S. 253, 264 (1984). The City also has an important interest in promoting the safety and well-being of citizens upon its public streets, *see e.g., Cox v. New Hampshire*, 312 U.S. 569, 574 (1941). Furthermore, legislatures have historically been regarded by this Court as having a wide range of authority to limit parental authority in matters affecting a child's welfare, particularly with respect to the public activities of the child. *Ginsberg*, 390 U.S. at 640; *Prince*, 321 U.S. at 167 . This broad authority remains valid even though the exercise of that authority may extend into areas where parents have a corresponding responsibility to supervise and protect their children, *see Ginsberg v. New York*, 390 U.S. at 640. Where the public activities of children are at issue, if a legislative body may reasonably conclude that those activities might be harmful to children then legislation enacted to protect the children falls within the lawful authority of the state. *Ginsberg*, 390 U.S. at 640 ("[T]he knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of [sexually explicit] material to them."); *Prince*, 321 U.S. at 169 ("Legislation appropriately designed to reach such evils [dangers of the streets] is within the state's police power, whether against the parent's claim to control of the child or one that religious scruples dictate contrary action.").

The interests asserted by the parents within this lawsuit are clearly unequal in weight to the intensely personal lifestyle choices identified in the Supreme Court decisions where private,

familial interests were held to prevail over the public interests at stake. *See, e.g., Moore v. City of East Cleveland*, 431 U.S. 494, 504-506 (1977); *Yoder*, 406 U.S. at 234-236; *Pierce*, 268 U.S. at 532-35; *Meyer*, 262 U.S. at 400-03. Where, as in this case, a juvenile curfew ordinance regulates only the unsupervised public activities of children during a few late-night hours, the guidance already provided by this Court suffices to inform lower courts as to how to balance the parental and community interests implicated by the ordinance. Since the Fourth Circuit and the trial court each correctly identified and considered applicable Supreme Court precedent, there is no need to grant a writ of certiorari to review this decision. *See Schleifer by Schleifer v. City of Charlottesville*, 159 F.3d 843, 852-53 (1998)(*Pet. For Writ of Cert.*, at A66-A68); *Schleifer*, 992 F.Supp 823, 827 (W.D. Va. 1997)(*Pet. For Writ of Cert.* at A45-A46); *Schleifer*, 963 F.Supp. 534, 546-47(W.D. Va. 1997)(*Pet. For Writ of Cert.*, at A21-A24).

4. THE FOURTH CIRCUIT CORRECTLY IDENTIFIED AND APPLIED SUPREME COURT PRECEDENT DEFINING THE CONSTITUTIONAL STANDARDS FOR EVALUATING THE CLARITY OF LEGISLATION.

The void-for-vagueness doctrine requires that a penal ordinance must be written with sufficient definiteness that ordinary people can understand what conduct is prohibited by the ordinance. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Furthermore, the language of the ordinance must not encourage arbitrary enforcement. *Id.* The arguments advanced by the petitioners, attacking the First Amendment protections built into this ordinance, would have this Court abandon one of the principal tenets of the vagueness doctrine: that the doctrine does not "convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." *Colten v. Kentucky*, 407 U.S. 104, 110 (1972).

Charlottesville's juvenile curfew ordinance, like the ordinances at issue in *Bykofsky v. Borough of Middletown*, 535 F.2d 1245 (3rd Cir. 1976) and *Qutb v. Strauss*, 11 F.3d

488 (5th Cir. 1993), provides an exception from criminal liability for children who choose to exercise First Amendment rights during the hours of the curfew. Furthermore, even anticipating that a police officer may occasionally be mistaken about whether or not a particular activity falls within the First Amendment exception, there is nothing inherent in the language of the curfew ordinance which requires such a result. In these two aspects, juvenile curfew ordinances like Charlottesville's differ in content and effect from the laws struck down in *Kolender v. Lawson*, 461 U.S. 352 (1983) and *Coates v. Cincinnati*, 402 U.S. 611 (1971). Speculation anticipating mistakes by police officers in hypothetical situations will not defeat an ordinance. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 503 (1982).

If juvenile curfew ordinances such as Charlottesville's have any effect upon the exercise of First Amendment freedoms by children, they reasonably affect only the time, place or manner of juvenile expression. Because the breadth of an ordinance must be judged in relation to its plainly legitimate sweep, an ordinance must be substantially overbroad before it may be invalidated on its face. *New York v. Ferber*, 458 U.S. 767, 770-772 (1982). Only conduct, not speech, is involved here. The restrictions established by the curfew ordinance are justified by community concerns for the welfare and safety of children, even if children's First Amendment liberty interests are infringed upon to some degree, *see Ginsberg v. New York*, 390 U.S. 629, 638-40 (1968); *Prince v. Massachusetts*, 321 U.S. 168, 169 (1944). If the ordinance regulated speech, which it does not, its provisions could only be described as content-neutral, and less than the strictest judicial review would be required. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1988); *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The City demonstrated to the satisfaction of both the trial court and the court of appeals that the concerns targeted by this curfew ordinance are real, consistent with the burden

associated with even the strictest standard of judicial review. *Schleifer by Schleifer v. City of Charlottesville*, 159 F.3d 843, 849-852 (4th Cir. 1998)(*Petition for Writ of Cert.* at A59-A66); *Schleifer v. City of Charlottesville*, 992 F.Supp. 823, 825 (W.D.Va. 1997) (*Petition For Writ of Cert.* at A40); *Schleifer v. City of Charlottesville*, 963 F.Supp. 534, 544-546 (W.D.Va. 1997) (*Petition For Writ of Cert.* at A16 – A20). Where nineteen to twenty hours of each day remain unaffected by the curfew, and where numerous exceptions allow children a wide variety of opportunities to engage in activities protected by the First Amendment during the four to five hours of curfew, it is clear that Charlottesville's ordinance does not exceed the boundaries set by applicable decisions of this Court.

The courts below each identified and correctly followed Supreme Court precedent applicable to the issue raised by the third of Petitioners' Questions Presented. *Schleifer by Schleifer v. City of Charlottesville*, 159 F.3d at 853-54 (*Petition for Writ of Cert.*, at A68 - A70); *Schleifer v. Charlottesville*, 992 F.Supp. at 827-29 (*Petition for Writ of Cert.*, at A46 - A49); *Schleifer v. City of Charlottesville*, 963 F.Supp. at 548-49 (*Petition for Writ of Cert.*, at A24 – A28). Accordingly, Petitioners posit no viable argument that existing Supreme Court precedent fails to provide adequate guidance, or that the lower courts departed from established precedent in this case.

CONCLUSION

This case does not merit further review by this Court. For the reasons advanced above, the City of Charlottesville respectfully requests the Court to deny a writ of certiorari.

Respectfully submitted,

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Dated: February 17, 1999

AN ORDINANCE TO AMEND AND REORDAIN SECTION 17-7 OF CHAPTER 17 OF THE CHARLOTTESVILLE CITY CODE, 1990, AS AMENDED, RELATING TO A GENERAL CURFEW FOR MINORS

BE IT ORDAINED by the Council of the City of Charlottesville, Virginia that:

1. Section 17-7 of the Code of the City of Charlottesville, 1990, as amended, is hereby amended and reordained, as follows:

Section 17-7. Curfew for Minors.

The purpose of this section is to: (i) promote the general welfare and protect the general public through the reduction of juvenile violence and crime within the City; (ii) promote the safety and well-being of the City's youngest citizens, persons under the age of seventeen (17), whose inexperience renders them particularly vulnerable to becoming participants in unlawful activities, particularly unlawful drug activities, and to being victimized by older perpetrators of crime; and (iii) foster and strengthen parental responsibility for children.

(a) Definitions.

As used within this section 17-7, the following words and phrases shall have the meanings ascribed to them below:

"Curfew hours" refers to the hours of 12:01 a.m. through 5:00 a.m. on Monday through Friday, and 1:00 a.m. through 5:00 a.m. on Saturday and Sunday.

"Emergency" refers to unforeseen circumstances, or the status or condition resulting therefrom, requiring immediate action to safeguard life, limb or property. The term includes, but is not limited to, fires, natural disasters, automobile accidents, or other similar circumstances.

"Establishment" refers to any privately-owned place of business within the City operated for a profit, to which the public is invited, including, but not limited to any place of

amusement or entertainment. With respect to such Establishment, the term "Operator" shall mean any person, and any firm, association, partnership (and the members or partners thereof) and/or any corporation (and the officers thereof) conducting or managing that Establishment.

"Minor" refers to any person under seventeen (17) years of age who has not been emancipated by court order entered pursuant to Section 16.1-333 of the Code of Virginia, 1950, as amended.

"Officer" refers to a police or other law enforcement officer charged with the duty of enforcing the laws of the Commonwealth of Virginia and/or the ordinances of the City of Charlottesville.

"Parent" refers to:

(1) a person who is a minor's biological or adoptive parent and who has legal custody of a minor (including either parent, if custody is shared under a court order or agreement);

(2) a person who is the biological or adoptive parent with whom a minor regularly resides;

(3) a person judicially appointed as a legal guardian of the minor; and/or

(4) a person eighteen (18) years of age or older standing in loco parentis (as indicated by the authorization of an individual listed in part(s) (1), (2) or (3) of this definition, above, for the person to assume the care or physical custody of the child, or as indicated by any other circumstances).

"Person" refers to an individual, not to any association, corporation, or any other legal entity.

"Public Place" refers to any place to which the public or a substantial group of the public has access, including, but not limited to: streets, highways, roads, sidewalks, alleys, avenues, parks, and/or the common areas of schools,

hospitals, apartment houses, office buildings, transportation facilities and shops.

"Remain" refers to the following actions:

(1) to linger or stay at or upon a place; and/or

(2) to fail to leave a place when requested to do so by an officer or by the owner, operator or other person in control of that place.

"Temporary care facility" refers to a non-locked, non-restrictive shelter at which minors may wait, under visual supervision, to be retrieved by a parent. No minors waiting in such facility shall be handcuffed and/or secured (by handcuffs or otherwise) to any stationary object.

(b) It shall be unlawful for a minor, during curfew hours, to remain in or upon any Public Place within the City, to remain in any motor vehicle operating or parked therein or thereon, or to remain in or upon the premises of any Establishment within the City, unless:

(1) the minor is accompanied by a parent; or

(2) the minor is involved in an emergency; or

(3) the minor is engaged in an employment activity, or is going to or returning home from such activity, without detour or stop; or

(4) the minor is on the sidewalk directly abutting a place where he or she resides with a parent; or

(5) the minor is attending an activity sponsored by a school, religious, or civic organization, by a public organization or agency, or by another similar organization or entity, which activity is supervised by adults, and/or the minor is going to or returning from such an activity without detour or stop; or

(6) the minor is on an errand at the direction of a parent, and the minor has in his or her possession a writing signed by the parent containing the following

information: the name, signature, address and telephone number of the parent authorizing the errand, the telephone number where the parent may be reached during the errand, the name of the minor, and a brief description of the errand, the minor's destination(s) and the hours the minor is authorized to be engaged in the errand; or

(7) the minor is involved in interstate travel through, or beginning or terminating in, the City of Charlottesville; or

(8) the minor is exercising First Amendment rights protected by the United States Constitution, such as the free exercise of religion, freedom of speech and the right of assembly.

(c) It shall be unlawful for a minor's parent to knowingly permit, allow or encourage such minor to violate 17-7(b).

(d) It shall be unlawful for a person who is the owner or operator of any motor vehicle to knowingly permit, allow or encourage a violation of 17-7(b).

(e) It shall be unlawful for the Operator of any Establishment, or for any person who is an employee thereof, to knowingly permit, allow or encourage a minor to remain upon the premises of the Establishment during curfew hours. It shall be a defense to prosecution under this subsection that the Operator or employee of an Establishment promptly notified the police department that a minor was present at the Establishment after curfew hours and refused to leave.

(f) It shall be unlawful for any person (including any minor) to give a false name, address, or telephone number to any officer investigating a possible violation of this section 17-7.

(g) Enforcement.

(1) Minors. Before taking any enforcement action hereunder, an officer shall make an immediate investigation

for the purpose of ascertaining whether or not the presence of an minor in a public place, motor vehicle and/or Establishment within the City during Curfew hours is in violation of 17-7(b).

(A) If such investigation reveals that the presence of such minor is in violation of 17-7(b), then:

(1) if the minor has not previously been issued a warning for any such violation, then the officer shall issue a verbal warning to the minor, which shall be followed by a written warning mailed by the police department to the minor and his or her parent(s), or

(2) if the minor has previously been issued a warning for any such violation, then the officer shall charge the minor with a violation of this ordinance and shall issue a summons requiring the minor to appear in court (Ref. Va. Code § 16.1-260(H)(1)). And

(B) As soon as practicable, the officer shall:

(1) release the minor to his or her parent(s); or

(2) place the minor in a temporary care facility for a period not to exceed the remainder of the curfew hours, so that his or her parent(s) may retrieve the minor; or

(3) if a minor refuses to give an officer his or her name and address, refuses to give the name and address of his or her parent(s), or if no parent can be located prior to the end of the applicable curfew hours, or if located, no parent appears to accept custody of the minor, the minor may be taken to a nonsecure crisis center or juvenile shelter and/or may be taken to a judge or intake officer of the juvenile court to be dealt with in the manner and pursuant to such procedures as required by law.

(Ref. Va. Code § 16.1-260(H)(1); 16.1-278.6; §§ 16.1-241(A)(1)).

(2) Others. If an investigation by an officer reveals that a person has violated 17-7(c),(d) and/or (e), and if the person has not previously been issued a warning with respect to any such violation, an officer shall issue a verbal warning to the person, which shall be followed by a written warning mailed by the police department to the person; however, if any such warning has previously been issued to that person then the officer shall charge the person with a violation and shall issue a summons directing the person to appear in court.

(h) Each violation of this section 17-7 shall constitute a Class 4 Misdemeanor.

2. Within one year after the effective date of March 1, 1997 of this ordinance, the City Manager shall review this ordinance and report and make recommendations to the City Council concerning the effectiveness of and the continuing need for the ordinance. The City Manager's report shall specifically include the following information: (a) the practicality of enforcing the ordinance and any problems with enforcement identified by the Police Department; (b) the impact and cost of the ordinance; (c) other data and information which the Police Department believes to be relevant in assessing the effectiveness of the curfew ordinance; and (d) information from citizens regarding whether the ordinance has been administered and enforced fairly, including information regarding the age, gender and race of those charged or detained under the ordinance.

3. This ordinance shall be effective on March 1, 1997, at 12:01 a.m.

Approved by City Council on December 16, 1996

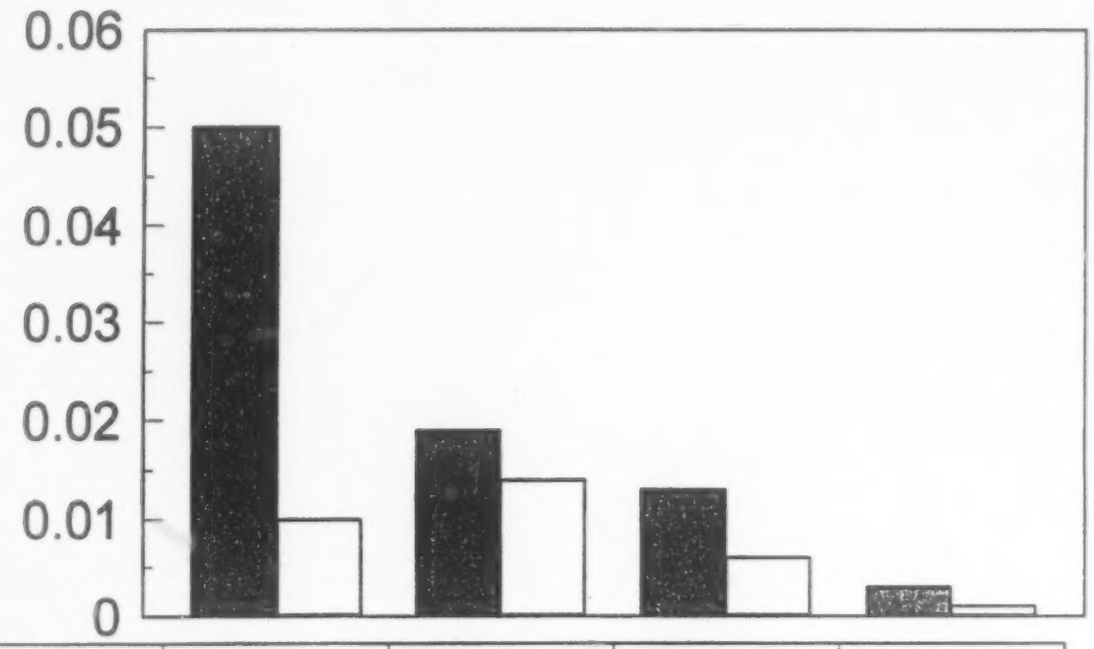
s/ Jeanne Cox
Clerk of Council

Reported Offenses per Hour during Curfew and Non-Curfew Hours from January 1 - December 31, 1996*

	# Offenses in Curfew Hours
DUI	86
Aggravated Assault	33
Robbery	23
Forcible Rape	6
	# Offenses in Non-Curfew Hours
DUI	70
Aggravated Assault	100
Robbery	46
Forcible Rape	11

Total Number of
Curfew Hours 1996 = 1,726

Total Number of
Non-Curfew Hours 1996 = 7,058



	DUI	Aggravated Assault	Robbery	Forcible Rape
Curfew	0.050	0.019	0.013	0.003
NonCurfew	0.010	0.014	0.006	0.001

** Based on data collected from Incident Reports from Charlottesville Police Department files*

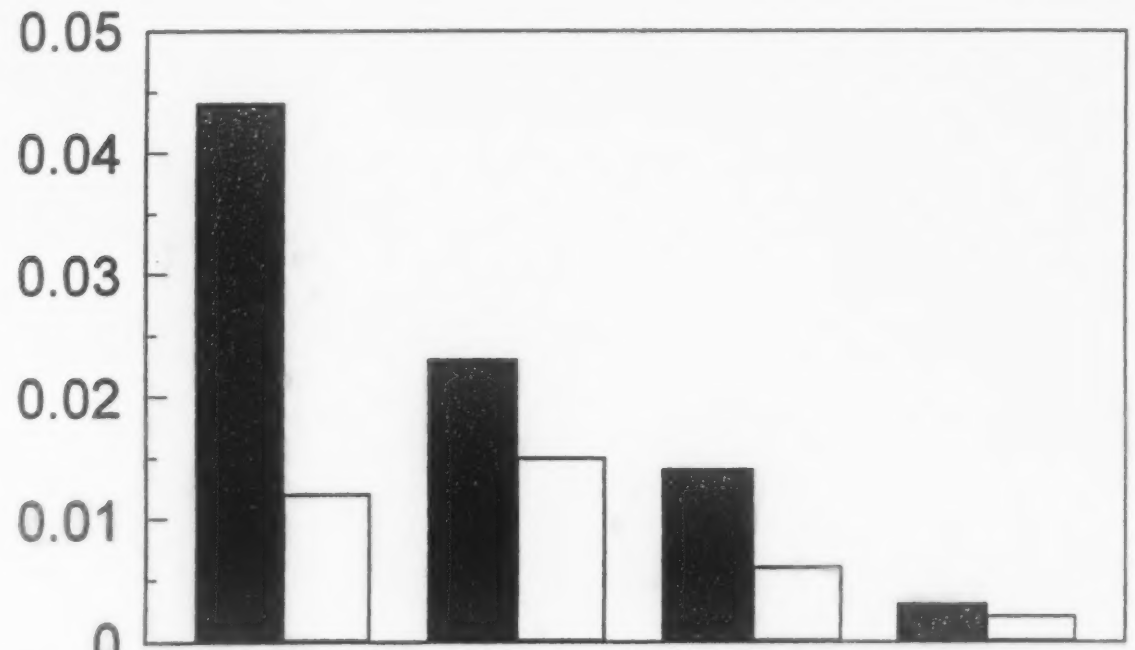
Chart Prepared
May 9, 1997

Reported Offenses per Hour during Curfew and Non-Curfew Hours from January 1 - April 30, 1997*

	# Offenses in Curfew Hours
DUI	25
Aggravated Assault	13
Robbery	8
Forcible Rape	2
	# Offenses in Non-Curfew Hours
DUI	29
Aggravated Assault	36
Robbery	13
Forcible Rape	4

Total Number of Curfew Hours 1997 = 566

Total Number of Non-Curfew Hours 1997 = 2,314



	DUI	Aggravated Assault	Robbery	Forcible Rape
Curfew ■	0.044	0.023	0.014	0.003
NonCurfew □	0.012	0.015	0.006	0.002

** Based on data collected from Incident Reports from Charlottesville Police Department files*

Chart Prepared
May 7, 1997